In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 1167

ROBERT MOODY, AUGUST J. LANG, JR., and R. F. McMULLEN,
Petitioners,

vs.

TOOLE COUNTY IRRIGATION DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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to the United States Circuit Court of Appeals for the Ninth Circuit.

The petition of Robert Moody, August J. Lang, Jr., and R. F. McMullen respectfully shows:

JURISDICTION.

The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code (28 U. S. C. § 347 (a)).

The judgment of the Court below was rendered January 28, 1942. (R. 129.) The opinion of the Court below (R. 120-28) is reported in 125 F. (2d) 498.

The issuance of the mandate of the Court below was stayed to and including April 27, 1942, and in the event a petition for writ of certiorari be docketed in the Supreme Court of the United States on or before said date, until after the Supreme Court passes upon said petition.

QUESTIONS PRESENTED.

1. In view of the *Tompkins* case, it is now established that a state Court decision changing earlier construction of a statute is, in substance and effect, an amendment of the statute. Does it follow that a state Court decision changing the interpretation of the statute so as to impair or destroy previously established contract rights, violates the tenth section of Article I of the Constitution, forbidding the states to pass any law impairing the obligation of contracts?

2. If it does not follow, must the *Tompkins* case be taken to overrule the many cases which hold that the federal Courts are not bound to connive at repudiation of public debts by the Courts of a state? See:

Gelpcke v. Dubuque, 1 Wall. 175, 206;
Bolles v. Brimfield, 120 U. S. 759, 764.

3. Where the Supreme Court of Montana and the lower Circuit Court has declared the bonds in this case to be general obligations, do not such decisions establish a rule of property which should not be disturbed by a subsequent Montana Supreme Court decision?

4. Was it error for the Court below unqualifiedly to reverse a money judgment for plaintiffs in an

action on bonds admittedly overdue and unpaid, where there is nothing in the record to indicate that the District is without funds, and nothing to indicate that an order in the nature of a writ of mandamus, directing the levy of assessments to satisfy the debt in question, would be fruitless?

5. In a previous case, brought by a stranger to the present proceeding, it was held that the very bonds here involved were general obligations, and that all the lands within the District were assessable until all the bonds were paid. Petitioners brought this action on said bonds as trustees; and one of the *cestuis* was an intervener in the previous case. Is it *res judicata* against the District that the bonds are general obligations?

6. Where, following a Supreme Court decision of the State holding the very bonds here involved to be general obligations, the appellee enters into a new written contract to pay the amount due in full with interest and to levy taxes therefor, and there is no Montana decision holding such a contract void, does such a new promise sustain the judgment of the District Court?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. We submit that this Court should decide each of the "questions presented", set out above.

The many cases like

Gelpcke v. Dubuque, supra,

and the many more like

Bolles v. Brimfield, supra,

have not yet been overruled. The question whether or not the doctrines of those cases are still law, should, we submit, be settled.

2. The *Tompkins* case holds, we submit, that regarding substance rather than form (as should be done in constitutional cases), there is no difference in substance between an amending statute and an overruling decision which changes the construction of a statute. If this is true, then, this Court should announce whether or not such overruling decisions are embraced within, are in some manner or degree affected by, the constitutional provision that no state shall pass any law impairing the obligation of contracts.

3. We submit that the impropriety of the judgment of the Court below, flatly reversing a money judgment for money admittedly owing, is apparent.

STATEMENT OF THE CASE.

This action was brought in the District Court of the United States, District of Montana, to recover judgment for the principal and interest of certain bonds, issued by respondent pursuant to Laws of Montana, 1909, Ch. 146, as amended. (R. 120, 121.)

Respondent's answer admitted the execution of the bonds and the fact of non-payment. (R. 20.) The trial Court rendered judgment for plaintiffs (petitioners here), and defendant appealed. The judgment was reversed by the Court below.

Respondent, Toole County Irrigation District, was organized under the laws of the State of Montana in 1919. The district contains 282,191.63 acres, of

which 147,985.1 acres have been found to be irrigable. (85 Mont. 94, 97.)

In 1921 and 1922, respondent issued the bonds in suit. At that time there had been no decision in the Appellate Courts of Montana on the principal question here in dispute. That question is whether these bonds are (as we contend), a general indebtedness, in the sense that all lands in the District are taxable for payment thereof until the entire indebtedness is fully paid, or whether (as respondent contends), each parcel of land in the District can escape from the lien of the bonds by paying merely its proportion of the total bonded indebtedness.

In 1925, the Supreme Court of Montana held that bonds of Montana irrigation districts are general obligations, as we contend they are:

Cosman v. Chestnut Valley Irrigation District, 74 Mont. 111.

Several later cases reached the same result:

Clark v. Demers, 78 Mont. 287, 293-294;
Drake v. Schoregge, 85 Mont. 94, 104.

Drake v. Schoregge, just referred to, involved the very bonds here in suit. That case was an action to enjoin a tax sale of lands in Toole County Irrigation District, under an assessment levied to create a sinking fund to pay the bonded indebtedness now before this Court. The Court held (p. 104), that

> "Bonds issued create a general indebtedness against the district, in the sense that all lands therein are taxable for the payment thereof with interest, until the entire indebtedness is fully paid. (*Cosman v. Chestnut Valley Irr. Dist.,* 74 Mont. 111, 40 A.L.R. 1344, 238 Pac. 879.)"

Petitioners are trustees of the bonds here involved. (R. 81, 83, 24.) One of the *cestuis,* Mr. T. C. Elliott (R. 86), was a party to the *Schoregge* case, having filed a complaint in intervention, as did the respondent irrigation district. (85 Mont. 94, 96.)

In the present case, plaintiffs did not plead *res judicata,* for the reason that as the law then stood, petitioners were entitled to the relief sought, and were entitled to the levy of assessments against all the lands in the District until the entire amount owing was paid.

All of the bonds here in suit matured on January 1, 1930. (R. 4, 9, 13, 14.) On May 1, 1930, after default of all the bonds, respondent district entered into a contract with the bondholders called a "Plan", which is set out in full in petitioners' pleadings. (R. 65-73.) Its execution is admitted. (R. 84.) This plan recites the issuance of the bonds, the fact of default, and that

> "the parties hereto desire to provide for the payment in full of the principal of said bonds, together with interest thereon until the same shall be fully and finally paid. * * *"

The District then agrees

> "that it has levied, and will hereafter levy and cause to be collected, taxes upon all of the taxable land within the District in an amount sufficient to pay the entire principal amount of the bonds now outstanding, together with interest thereon, on or before the first day of January, 1935."

The District further agrees

> "that it will pay interest upon the principal amount of the bonds now outstanding, at the rate

> of six (6) per cent per annum, payable semi-annually on July 1st and January 1st of each year until all of said bonds shall be fully and finally paid."

Thereafter, during the depression, the Supreme Court of Montana overruled its previous decisions concerning Montana irrigation district bonds, and announced the view now relied on by respondent. The Court held that the bonds are not a general obligation of the District, but are a mere charge against the lands within it; and that the amount of delinquent assessments for the payment of the bonds and interest may not be included in later assessments against other lands in the District:

> *State Ex Rel Malott v. Board of County Commissioners of Cascade County,* 89 Mont. 37, 85 ff.

In 1934, the Circuit Court of Appeals for the Ninth Circuit was confronted with the same problem, in

> *Judith Basin Irrigation District v. Malott,* 73 F.(2d) 142.

In that case, the Court first stated that

> "At the time the bonds involved in this action were issued and sold there was no interpretation of the statute by the Supreme Court of Montana. Under these circumstances this court must exercise its own independent judgment as to the meaning of the statute under which the bonds were issued." (73 F. (2d) 142, 145.)

After a full review of the precedents, and a detailed examination of the Montana statutes, the Court held, in accord with the earlier Montana cases, that the bonds of a Montana irrigation district (such as those

involved there and in the present case), are a general lien on the lands within the District.

The complaint in the present action was filed on April 27, 1937. (R. 2.)

Almost exactly a year later on April 25, 1938, this Court decided the case of

Erie Railroad Co. v. Tompkins, 304 U. S. 64;

and the Court below, in reversing the judgment of the trial Court, held that the doctrine of its decision in

Judith Basin Irrigation District v. Malott, 73 F.(2d) 142, *supra,*

had been overruled by the *Tompkins* case, and that therefore the judgment of the trial Court must be reversed. (R. 120, 124-125.)

Wherefore, Robert Moody, August J. Lang, Jr., and R. F. McMullen pray that a writ of certiorari issue to review the judgment entered January 28, 1942, in the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause.

Dated, Turlock, California,
April 22, 1942.

ROBERT MOODY,
AUGUST J. LANG, JR.,
R. F. MCMULLEN,
By W. COBURN COOK,
Counsel for Petitioners.

CHARLES DAVIDSON,
EVAN HAYNES,
Of Counsel.

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TOOLE COUNTY IRRIGATION DISTRICT,
Respondent.

BRIEF IN SUPPORT OF PETITION.

INTRODUCTION.

The statutory provisions sustaining jurisdiction, and the jurisdictional facts, are set out in the Petition.

The judgment of the Court below appears in the record, pages 120-128, and is reported in 125 F. (2d) 498.

I.

THE FEDERAL COURTS SHOULD NOT CONNIVE AT REPUDIATION BY THE STATES OF THEIR OBLIGATIONS.

In Part II we attempt to show that breach of faith, whether public or private, is not in the public interest; and should not be aided by the Courts except when other factors are present which justify it.

(a) A judicial decision may impair the obligation of contracts just as a statute may.

A decision of a state Court which, by construing a statute, destroys or impairs contract rights previously acquired, has the undeniable effect of impairing the obligation of the contract in fact, whether or not it falls within the tenth section of Article I of the Constitution.

Otherwise stated, the Constitution provides that "no State shall * * * pass any * * * law impairing the obligation of contracts * * *". There is, of course, much authority for the proposition that a state Court decision does not fall within the scope of this prohibition:

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 451.

This result was doubtless inevitable so long as the Courts accepted the proposition that a Court cannot make, but merely declares, the law.

It is nevertheless plain that a state Court has the physical power to impair the obligation of a contract (by construing a statute unreasonably, or by changing its construction), precisely as the legislature has the power to impair it by amending the statute. The

decisions which most obviously do so are decisions which, as in the present case, overrule earlier decisions which were in entire accord with the words of the statute, and with the decisions in other states interpreting similar statutes. The decision of the Court below in the *Judith Basin* case, concerning the precise question here presented, is a perfect illustration.

In short, the answer to the question whether or not a state Court's decision falls within the prohibition of Section 10 of Article I of the Constitution turns on the answer to the question whether, when a state Court decides a case, it can be said to "pass a law". But the question whether or not the decision impairs the obligation of a contract, depends on the factual relation between the contract and the decision.

(b) The rule of the Erie case does not require that state decisions which destroy contract rights must be administered and applied with like effect by the federal Courts.

Swift v. Tyson, 16 Pet. 1, 18,

established the proposition that on questions governed by a state statute, the federal Courts must accept, not only the statute, but also "the construction thereof adopted by the local tribunals".

It has nevertheless been well settled in the past, that although the federal Courts are bound by the state Court's construction of state laws, they are not bound to give retroactive effect to such decisions. And when such a decision destroys or impairs the obligation of a contract, the federal Courts should not.

and have not in the past, given it retroactive effect. As was said by Mr. Chief Justice Taney in the very early case of

Rowan v. Runnels, 5 How. 134, 139,

> "Undoubtedly this court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.
>
> "But we ought not to give to them a retroactive effect, and allow them to render invalid contracts * * * which in the judgment of this court were lawfully made."

The rule has two aspects:

1. It applies where contract rights accrue under a statute prior to any interpretation thereof by the state Courts;

2. It applies where, after one interpretation of the statute, contract rights accrue, followed by a change in interpretation which destroys or impairs the contract rights in question.

As was said in

Anderson v. Santa Anna, 116 U. S. 356, 362:

> "* * * when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or where there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

A host of cases in which this doctrine has been applied are collected in 97 A. L. R. 515, following a reprint of the opinion in *Judith Basin Irrigation Dist. v. Malott,* 73 F. (2d) 142.

It is important to observe that the "general law" doctrine of *Swift v. Tyson* was not the foundation for the refusal of the federal Courts to follow state Court decisions, either in the situation typified by *Gelpcke v. Dubuque* or in that typified by the *Judith Basin* case, 73 F. (2d) 142.

On the contrary, these cases rest on considerations which were not present, either in *Swift v. Tyson* or in the *Erie* case.

Thus in *Gelpcke v. Dubuque,* 1 Wall. 175, the Court said, quoting from *Ohio Life and Trust Co. v. Debolt,* 16 How. 432,

> "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." (1 Wall. 175, 206.)

The doctrine of the *Gelpcke* case was, of course, reiterated and applied in scores of cases. They are collected in 97 A. L. R. at pages 516-522.

II.

REPUDIATION OF DEBTS IS NOT, AS SUCH, IN THE PUBLIC INTEREST.

The existence of bankruptcy laws, and the fact that apart from those laws, conditions may arise in which the public interest requires that outstanding debts, or some of them, be reduced or extinguished, should not lead to the conclusion that repudiation of debts is, as such, in the public interest.

On the contrary, it is surely better for the general understanding to be that promises openly and fairly made must be lived up to.

A merely casual reading of the opinion of the Court below in

Judith Basin Irrigation District v. Malott, 73 F. (2d) 142,

will show that the earlier Montana decisions were correct, and indeed inevitable, in view of the language and history of the statute in question. As the Court said in the *Judith Basin* case (p. 145),

> "The law of Montana authorizing the formation of irrigation districts, like that of many western states, is patterned after the Wright Act of California (St. Cal. 1887, p. 29). *Tomich v. Union Trust Co.,* 31 F. (2d) 515. As stated by the Supreme Court of Montana in *Re Crow Creek Irrigation District,* 63 Mont. 293, 207 Pac. 121, 122: 'In its general legislative plan, our statute is modeled after the Wright Law of California (*O'Neill v. Yellowstone Irr. Dist.,* 44 Mont. 492, 121 Pac. 283). * * *'
>
> "It has been uniformly held that the bonds of an irrigation district issued in pursuance of the

> Wright Act (St. Cal. 1887, p. 29, as amended) are general obligations of the district and this has been true in states where the state legislation has varied slightly from the provisions of the Wright Act but has been based upon it."

See also:

> *Fallbrook Irr. Dist. v. Bradley,* 164 U. S. 112;
> *Marlin v. Lewallen,* 276 U. S. 58, 62-63.

The same opinion shows that the later Montana decisions, wherein the opposite conclusion was reached, cannot be defended.

Hillhouse in his "Municipal Bonds", page 291, says:

> "Indeed, it has been said that the confidence manifested toward municipal bonds as 'securities' has been largely due to the attitude of the lower federal courts, and finally of the United States Supreme Court."

Judge John F. Dillon, when commenting upon this subject in 1876 said (Dillon, p. 443):

> "The Supreme Court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint against repudiation even when made on legal grounds termed solid by the State courts, by municipalities which had been deceived and defrauded. That such securities have any general value left is largely due to the course of adjudication in respect thereto by the Supreme Court. * * *"

In an elaborate note to the case of *Snare & Triest Co. v. Friedman,* 169 Fed. 1, in L.R.A. 40 N.S. 1912,

p. 367 at 407, it is stated that the federal Court nearly always follows the decisions of the highest Court of the state when the decisions sustain the validity of the bonds, but when the latest decisions on a statute would render the bonds invalid, the federal Court, unless as an independent proposition, it would reach the same conclusion, "generally finds some way of upholding the bonds notwithstanding the state Court decisions" and the note points out that "The precise ground of exception to the general rule, is apt to be dictated by the exigencies of the particular case". (p. 408.) Numerous decisions are collected in this note.

A course of state Court decisions may become a rule of property. See *Folsom v. Township 96,* 159 U. S. 611. The true rule may be that property rights cannot be taken away by state Court decision.

Many decisions show that the Supreme Court has not in the past found it difficult to find a basis for decision unfavorable to repudiation. It is a practical question.

III.

THE ERIE CASE LEAVES SEVERAL COURSES OPEN IN CASES LIKE THE PRESENT ONE.

In view of all the foregoing, it is, we submit, apparent that several possible solutions of controversies like the present one are at least logically possible:

(1) The federal Courts may hold that the *Erie* case leaves the rules announced in the *Gelpcke* case and the *Judith Basin* case unimpaired.

Plainly, the grounds upon which the rules in these cases rest are adequate to justify the conclusion that though the federal Courts are bound by state Court decisions as determining state law, they are not bound to hold that the rules announced by the state Courts were the law of the state from the beginning. See:

Texarkana v. Arkansas Gas Co., 306 U. S. 188, 201-202;

Getz v. Nevada Irr. Dist., 112 F. (2d) 495, 497.

(2) The federal Courts may hold, contrary to many earlier decisions, that a state Court decision which construes a statute is a law within the meaning of the tenth section of the first Article of the Constitution.

The proposition just stated is, we submit, the very foundation of the rule of the *Erie* case itself. That case rests upon the dissenting opinions of Mr. Justice Holmes, which in turn are grounded squarely upon the proposition that judicial decisions are legislative in nature. See, particularly, his dissenting opinion in:

Kuhn v. Fairmont Coal Co., 215 U. S. 349, 371;

Southern Pacific Co. v. Jensen, 244 U. S. 205, 221.

In the case last cited Mr. Justice Holmes said, "I recognize without hesitation that judges do and must legislate * * *." This view is further fortified by the concurring opinion of Mr. Justice Reed in the *Erie* case (304 U. S. 64, 90 ff.) as well as by the majority opinion itself.

Again, in

Douglass v. County of Pike, 101 U. S. 677, 687, the Court said:

> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." (105 U. S. 60, 72.)

If the Court does not take this view then it is a noteworthy fact that the position will be this: that although an inescapable corollary of the *Tompkins* case is that state Court decisions like the later Montana cases here involved, are, in all essential respects, both in their juridical nature and in their effect, the precise equivalent of statutes which the Constitution forbids the states to enact, and which it is the power and constitutional duty of the federal Courts to condemn, notwithstanding all this, the federal Courts are nevertheless helpless; because decisions are not "laws", or if laws, were not "passed".

(3) The federal Courts might hold (although we submit they should not), that decisions like *Gelpcke v. Dubuque* and the *Judith Basin* case, although not unconstitutional, are wrong.

It is thinkable that the federal Courts might so hold, on the ground that the federal Courts should accept these state decisions as declarations of law *ex post facto;* under the ancient and essentially mystical doctrine that judicial decisions, declare, but cannot make, the law.

In view of the trend of recent decisions (particularly the *Erie* case itself), which repudiate this doctrine, it seems clear that the Court should not take this view. See, also,

Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U. S. 358.

(4) The federal Courts might hold that although the rules announced in *Gelpcke v. Dubuque,* and in cases like the *Judith Basin* case, achieve a desirable result, they must nevertheless be overruled, because, under an extension of the reasoning in the *Erie* case, it is unconstitutional for the federal Courts to refuse to follow such state Court decisions. This, we submit, would be unsound.

There is, we submit, no sound ground upon which it could be held that the rules of *Gelpcke v. Dubuque* and the *Judith Basin* case are unconstitutional.

The Constitution does not require the federal Courts to give retroactive effect to state decisions construing statutes.

The unconstitutionality of *Swift v. Tyson,* declared by the majority opinion in the *Erie* case, rests, not on the proposition that federal Courts must follow state Court decisions, but on the very different proposition that the federal Courts are without power to make

law for the states. (304 U. S. 64, 78 ff.) But when a Court proceeds as this Court did in the *Gelpcke* case, or as the Court below did in the *Judith Basin* case, it does not make law for the state. On the contrary it simply recognizes (what the state would freely admit) that in every factual sense, the rule announced in the earlier state Court decision was the law of the state, was the rule governing every person and agency in the state, including the Courts, up to the moment when the overruling case was decided. All this, of course, is not only recognized by, but is the vital ground for, the decision of the *Erie* case.

It simply is not true that under the doctrine of the *Erie* case, the federal Courts are bound, constitutionally or otherwise, to give retroactive effect to state judicial decisions. *A fortiori*, the *Erie* case should not be taken to hold that the Constitution requires giving retroactive effect to state decisions in cases where, as here, the effect of doing so is to violate the spirit if not the letter of the tenth section of Article I of the Constitution, is in every realistic sense to destroy contract rights, and is to abdicate both the power and the duty of the federal Courts to protect non-resident litigants against unfair treatment by the local tribunals.

IV.

IT IS (WE SUBMIT) RES JUDICATA THAT THE BONDS IN SUIT ARE GENERAL OBLIGATIONS.

Petitioners brought this action as trustees. (R. 81, 83, 24.) One of the *cestuis* is Mr. T. C. Elliott. (R. 86.) In the case of

Drake v. Schoregge, 85 Mont. 94, 104,

it was held that the very bonds here sued on are

> "a general indebtedness against the district, in the sense that all lands therein are taxable for the payment thereof with interest, until the entire indebtedness is fully paid. (*Cosman v. Chestnut Valley Irr. Dist.,* 74 Mont. 111, 40 A. L. R. 1344, 238 Pac. 879.)"

Mr. T. C. Elliott intervened in the *Schoregge* case, as did the respondent Toole County Irrigation District. (85 Mont. 94, 95.) As shown above, this decision concerning the nature of Montana irrigation district bonds was later overruled by the Supreme Court of Montana; and the fundamental basis of the decision of the Court below is that the later Montana decisions are controlling under the doctrine of the *Tompkins* case.

We submit that the question is *res judicata* as against the District.

(a) It is unnecessary to plead res judicata in such a case as this.

As explained in the petition, petitioners did not plead *res judicata* because under the laws it then stood, and as it stood for a year thereafter, petitioners' rights against the District could be vindicated without difficulty.

In any event, it is settled that where, as here, a former adjudication is relied on as *res judicata,* not of the very cause of action asserted, but simply as conclusive of a particular issue or question, the former adjudication need not be pleaded:

Southern Pacific R. Co. v. United States, 168 U. S. 1, 25, 59;
2 *Freeman on Judgments* (5th ed.) 1690;
Notes, 88 *A. L. R.* 574, 575;
Notes, 120 *A. L. R.* 8, 67 ff.

Moreover, where, as here, the issue claimed to be *res judicata* is a question of law, it is surely unnecessary, because it would be improper, to plead it.

(b) Such a question may become res judicata.

It is of course true that the doctrine of *res judicata* does not apply to "unmixed questions of law":

United States v. Moser, 266 U. S. 236.

But where, as here, a question has been litigated concerning the legal nature or effect of a particular right, that decision becomes *res judicata:*

Bissell v. Spring Valley Township, 124 U. S. 225, 235;
See 55 *Harv. L. Rev.* 120.

(c) Respondent is bound in this action by the prior adjudication.

The examination of the report in

Drake v. Schoregje, 85 Mont. 94,

indicates that the question, whether the bonds of Toole County Irrigation District are a general obligation, was exhaustively litigated; and both the District and the bondholders were actively represented. Moreover,

as pointed out, both respondent and at least one of the persons beneficially represented by petitioners in the present action, were actually parties in the *Schoregge* case. How much further privity can be established between the petitioners here and the parties in the *Schoregge* case, does not appear in the record.

The idea has been developing in recent years that there is little merit in the old notion that estoppel by judgment must be mutual; and that on the contrary, a litigant who has had his day in Court should be bound by the judgment even as against persons not parties thereto. This because of the strong policy against repeated litigation of the same question. See:

54 *Harv. L. Rev.* 889;
90 *U. of Pa. L. Rev.* 359;
55 *Harv. L. Rev.* 547;
18 *N. Y. U. L. Q. Rev.* 565;
Bernhard v. Bank of America, ... Cal. ....., 19 Adv. Cal. 877, 880, ff.

It was natural and proper, we submit, that petitioners should not invoke the *Schoregge* case as *res judicata,* particularly since under the directly applicable decision in the *Judith Basin* case (9th Cir., 73 F. (2d) 142), petitioners' right to complete relief was settled beyond any question.

If, therefore, the record does not sufficiently disclose the nature and degree of privity existing between petitioners and the parties to the *Schoregge* case, we submit that petitioners should be given an opportunity to develop fully the point of *res judicata.*

V.

PETITIONERS ARE ENTITLED TO A MONEY JUDGMENT IN ANY EVENT.

The complaint herein was simply a complaint for a money judgment. (R. 2, 19.) The judgment of the Court below was an unqualified reversal of the trial Court's judgment for the plaintiffs. (R. 129.)

As the case now stands, therefore, the judgment appears to be that nothing is owing to petitioners, notwithstanding that the answer admitted the execution of the bonds and the fact of non-payment, and notwithstanding the trial Court's findings and judgment, which show that $96,950, with interest from July 1, 1932, is owing and unpaid.

The explanation of this state of the record is as follows: In the first place, the complaint sought a money judgment pursuant to established federal practice.

It appears to be settled that in the federal Courts, the substantive rights of bondholders must first be determined in a suit for a money judgment, mandamus being simply an ancillary remedy. On this ground, the federal Courts may, and indeed must, proceed as the trial Court proceeded, notwithstanding contrary state practice.

County of Greene v. Daniel, 102 U.S. 187, 195.

As was declared in

Divide Creek Irrigation District v. Hollingsworth, 72 F. (2d) 859, 864,

"In the federal courts mandamus is an ancillary remedy, available in such instances as this,

> only after the right has ripened into judgment. An action to adjudicate the existence of the right is a necessary step in the enforcement of that right by mandamus. The courts of the United States are not deprived of the power to enforce the right because it is rooted in a state statute which prescribes a different method of enforcement in the state courts."

The new federal rules abolish the write of mandamus (Rule 81(b)), but do not indicate any change of the rule quoted above. See Moore's *Federal Practice,* p. 3427.

At the trial, respondent objected to the introduction in evidence of the agreed statement on the ground, among others, that

> "the Supreme Court of Montana has heretofore held that the bonds here sued on are not the obligations of the Irrigation District but merely charges against the lands within the District, and the Irrigation District merely acts as an agency in making the assessments and paying of the amounts collected, and the bondholder is not entitled to a money judgment against the irrigation district, and these decisions of the Supreme Court of Montana on a matter of state law are binding on this court, and under these decisions of the State Supreme Court, the Complaint herein does not state facts sufficient to constitute a cause of action." (R. 94-95.)

Thus the question was presented to the trial Court whether or not the bonds are a general obligation, payable by assessment on all the lands in the District until fully paid. Moreover, this fundamental question

was fully covered in the briefs submitted to the trial Court (R. 96); and was dealt with in detail and disposed by the trial Court, both in its opinion (R. 90, 92-93), and in its conclusions of law. (R. 100, 101.) The Court below disagreed with the trial Court's decision on this question, and reversed the judgment without any qualification. (R. 121, ff.)

It is, we submit, apparent that the unqualified reversal of the judgment was erroneous, since it seems to adjudicate that nothing is owing.

Whatever the merits of respondent's position on the question whether the bonds are a general lien, a large sum is admittedly owing, and petitioners are therefore entitled to a money judgment, to be enforced, so far as it can be, in later proceedings.

VI.

THE DISTRICT EXPRESSLY CONTRACTED TO PAY THESE BONDS AS A GENERAL OBLIGATION AT A TIME WHEN THE STATE LAW SO PROVIDED.

As shown in the petition herein, the Supreme Court of Montana held, in 1925, that bonds like these are a general obligation, payable out of assessments levied against all of the lands in the District until the debt is fully paid:

Cosman v. Chestnut Valley Irrigation District, 74 Mont. 111,

and reiterated this construction of the statute in 1929, in a case involving the very bonds here in suit:

Drake v. Schoregge, 85 Mont. 94.

Thereafter, in 1930, after all the bonds had defaulted, the District expressly undertook that it would do what these cases said the statute required it to do in any event, namely that it would

> "hereafter levy and cause to be collected taxes upon all of the taxable land within the District in an amount sufficient to pay the entire principal amount of the bonds now outstanding, together with interest thereon."

This contract emphasizes the fact that as conclusively interpreted, the Montana statutes enacted that these bonds were general obligations, until the overruling decision in

> *State Ex Rel Malott v. Board of County Commissioners of Cascade County,* 89 Mont. 37, 85,

decided years after the bonds here in suit had matured and years after the new promise, made by the District in 1930, to pay those bonds through general assessments on all taxable land within the District.

We know of no state Court decision bearing on the validity or effect of the District's new promise made in 1930.

In any event the District's new promise, made after the decisions holding the bonds to be general obligations, brings the present case squarely within the rule of

> *Gelpcke v. Dubuque,* supra.

CONCLUSION.

We urge that the judgment of the Court below should be reversed, and the judgment of the trial Court affirmed.

Dated, Turlock, California,
April 22, 1942.

Respectfully submitted,
W. COBURN COOK,
Counsel for Petitioners.

CHARLES DAVIDSON,
EVAN HAYNES,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

*this*_____*day of April, 1942.*

_____

Counsel for Respondent.

IN THE

Supreme Court

OF THE

United States

October Term, 1941

No. 1167

ROBERT MOODY, AUGUST J. LANG, Jr.,
and R. F. McMULLEN,
Petitioners,

vs.

TOOLE COUNTY IRRIGATION DISTRICT,
Respondent.

Respondent's Brief

In Opposition to Petition for Certiorari

LOUIS P. DONOVAN,
Shelby, Montana,
Counsel for Respondent.

WILLIAMS PRINTING COMPANY, SHELBY

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INTRODUCTION

The questions involved in this proceeding will be discussed in this brief in the same order that they are stated in the Petition for Writ of Certiorari. (Petition pages 2 and 3).

I.

The later decisions of the Supreme Court of Montana changing the previous interpretation of the statute under which the bonds involved herein were issued, does not impair "the obligation of contracts" within the prohibition of the Tenth Section of Article I of the Federal Constitution.

Section 10 of Article I of the Federal Constitution is directed only against the impairment of contracts by legislation. This point is definitely settled by numerous decisions of this Court. In Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382 Mr. Chief Justice Taft, speaking for the Court, said:

> "It has been settled by a long line of decisions that the provisions of Sec. 10, Article I of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation, and not by judgments of courts. The language—'No state shall * * * pass any * * * law impairing the obligation of contracts' — plainly requires such a conclusion."

The same rule was declared in the more recent case of Stockholders of Peoples Bank v. Sterling, 300 U. S. 175, 57 S. Ct. 386. In that case Mr. Justice Cardoza said:

> "Change by judicial construction of certain legislation does not impair a contract, at least in the forbidden sense, if it be granted arguendo that such a change can be discovered."

There are numerous earlier decisions to the same effect.

Mississippi & M. R. R. Co. vs. Rock, 4 Wallace (U. S.) 177, 18 L. Ed. 381.

Knox vs. Exchange Bank, 12 Wallace (U. S.) 379, 20 L. Ed. 414.

Mississippi & M. R. R. Co. vs. McClure, 10 Wallace (U. S.) 511, 19 L. Ed. 997.

National Mutual Building and Loan Association vs. Braham, 193 U. S. 635, 48 L. Ed. 823.

Roth vs. Oregon, 227 U. S. 150, 57 L. Ed. 458.

Columbia R. Gas & E. Co., vs. South Carolina, 261 U. S. 236, 67 L. Ed. 629.

McCoy vs. Union Elevated R. R. Co. 247 U. S. 354, 62 L. Ed. 1156.

The decision of this Court in Erie Railroad Company vs. Tompkins, 304 U. S. 64 and subsequent decisions to the same effect, cannot be deemed to overrule the decisions above cited, or to enlarge or extend the scope of the prohibition contained in Section 10, Article I of the Constitution.

It should also be noted that the bonds involved in this case were issued prior to the date of any State Court or Federal Court decisions interpreting the Statute under which the bonds were issued. The case does not therefore fall within the rule declared in Gelpcke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520, even if that case still be regarded as sound authority.

The bonds involved in Gelpcke v. Dubuque, supra, were issued subsequent to the State Court decisions upholding the validity of the State Statute and interpreting the same.

And it was this fact that constituted the basis of the decision in that case.

Gelpcke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520 at 525.

The same is true of the following cases:

Anderson vs. Santa Ana Township, 116 U. S. 356, 29 L. Ed. 633.

Douglass vs. County of Pike, 101 U. S. 677, 25 L. Ed. 968.

These decisions were all rested upon the ground that the liability of the Municipal Corporation issuing the bonds and the rghts of the parties purchasing the bonds should be determined according to the law as declared by the State Courts at the time the securities were issued. These decisions are not in point upon the question involved in this case, even if they could still be regarded as sound authority.

II.

The decision of this Court in the Tompkins case and subsequent cases require the Federal Courts to follow and apply the latest decisions of the Supreme Court of Montana in the interpretation of the state statute.

In the decision which Petitioners seek to have reviewed, the Circuit Court of Appeals followed the latest decisions of the Supreme Court of Montana in its interpretation of the State Statute under which the bonds were issued.

Toole County Irrigation District v. Moody, 125 Fed.

(2d) 498, (R. 120 to 128).

The latest decisions of the Supreme Court of Montana are to the effect that the bonds upon which the suit was brought, do not constitute an obligation of the Irrigation District and the District acts only as an agency through which assessments are levied and collected.

State ex rel Malott v. Board of County Commissioners of Cascade County, 89 Mont. 37, 296 Pac. 1.

Rosebud Land & Improvement Co. v. Carterville Irrigation Co., 102 Mont. 465, 58 Pac. (2d) 765.

In State ex rel Malott v. Board of County Commissioners of Cascade County, 296 Pac. 1, 89 Mont. 37 the Court said:

> "The bonds are not an obligation of the district at all, but rather a charge against the lands within the district. The lien applies to the lands within the district. The district, in its capacity as a public corporation, merely acts as the agency through which the assessments are levied and collected."
>
> * * * * * *
>
> "We are satisfied that the rule heretofore announced by this court to the effect that bonds issued by an irrigation district constitute general obligations of that district is erroneous."

State ex rel Malott v. Board of Commissioners of Cascade County, 89 Mont. 37, at 94-95, 296 Pac. 1, at 18-19.

The same view was reasserted in the subsequent case above cited.

Rosebud Land & Improvement Co. v. Carterville Irrigation District, 102 Mont. 465, 58 Pac. (2d) 765.

The Circuit Court of Appeals was obliged to follow these decisions and it properly held. (R. 125).

Vandenbork v. Owens Illinois Glass Co., 311 U. S. 538, 61 S. Ct. 347.

Leffingwell v. Warren, 2 Black. 599, 17 L. Ed. 261.

Stoner vs. New York Life Insurance Co., 311 U. S. 464.

Moore vs. Illinois Central R. R. Co., 312 U. S. 631, 61 S. Ct. 754.

III.

Since the rights of the bondholders and the liability of the Irrigation District have been definitely defined by State Court decisions, the Federal Courts have no right or authority to exercise an "independent judgment" in the interpretation of the statute.

The former rule that Federal Courts had a right to exercise an "independent judgment" as to the meaning of a State statute where contractual rights arose thereunder prior to the interpretation by the State Court, came to an end with the decision of this Court in Erie Railroad Co., v. Tompkins, 304 U. S. 64. The scope and effect of that decision is declared in the opinion of Mr. Justice Brandeis in the following language:

> "that the purpose of section (Sec. 34 of the Federal Judiciary Act of September 24, 1789. 28 U. S. C. A. Sec. 725), was merely to make certain that, **in all matters except those in which some federal law is controlling,**

the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written. (58 S. Ct., at 819)."

* * * * * *

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Erie Railroad Co. v. Tompkins, 304 U. S. 64.

The principle of Erie Railroad Co. v. Tompkins is thus made applicable to all cases in the Federal Court "except those in which some Federal law is controlling." All of the subsequent decisions of this Court have definitely denied to Federal Courts any right to exercise an "independent judgment" in the interpretation of State statutes in cases where the State statute has been interpreted by the State Supreme Court.

Stoner v. New York Life Insurance Co., 311 U. S. 464, 61 S. Ct. 336.

Vandebork vs. Owens Illinois Glass Co., 311 U. S. 538, 61 S. Ct. 347.

Moore v. Illinois Central R. Co., 312 U. S. 631, 61 S. Ct. 754.

The earlier decisions of this Court in Gelpcke v. Dubuque, 1 Wall. 175; Douglass v. County of Pike, 101 U. S. 677; Kuhn v. Fairmont Coal Co., 215 U. S. 349; Rowen v.

Runnals, 5 Howard, 134, cannot be reconciled with these later decisions and must be deemed overruled.

Whether or not the earlier decisions of the Supreme Court of Montana interpreting the irrigation statutes established a rule of property which should not be disturbed by subsequent decisions was a question of Montana law. The question was considered and answered by the Supreme Court of Montana in State ex rel Mallot v. Board of County Commissioners, 89, Mont. 37. In regard thereto, the Court said:

> "We are further satisfied that less injury will result from overruling rather than following the dictrine last announced and therefore the former holding of this Court that such bonds constitute general obligations is overruled." 89 Mont. at 95.

It must be conceded that state courts as well as other courts have a right to change their views; and the fact that the Supreme Court of Montana changed its view in regard to the interpretation of the irrigation district law presents no federal question in this case and does not justify the issuance of the Writ of Certiorari. Moore vs. Illinois Central Railway Co. 312 U. S. 631, 61 Sup. Ct. 754. Vander Bark vs. Owens-Illinois Glass Co. 311 U. S. 538, 61 Sup. Ct. 347.

IV.

The Circuit Court of Appeals properly reversed the judgment of the District Court for recovery of money against the Irrigation District.

The State court decisions definitely settled the law in Montana to the following effect:

> "The bonds are not an obligation of the District at all * * * The District in its capacity as a public corporation merely acts as the agency through which the assessments are levied and collected."
>
> State ex rel Malott v. Board of County Commissioners of Cascade County, 89 Mont. at 94-95, 296 Pac. at 18.

Under the rule of law above stated, there was nothing in the pleading or evidence in this case to justify the entry of a money judgment against the Irrigation District. The complaint merely alleges that the bonds were issued by the Irrigation District and were unpaid (R. 2119). This was admitted by the District's Answer. (R. 20-21). But since the bonds are not "an obligation of the District at all," the mere non-payment of the bonds does not justify the entry of a money judgment against the District.

There was no allegation in the pleadings and no proof in the record that the District had in any manner failed to perform its duties "as the agency through which the assessments are levied and collected." The bonds involved in this case are analagous to special improvement district bonds issued by municipalities; and mere non-payment of bonds does not justfy a money judgment against the municipality.

Gagnon v. Butte, 75 Mont. 279, 243 Pac. 1085.

V.

There is no basis for Petitioners' claim that the question here involved is Res Judicata.

In the Petition for Certiorari, petitioner makes the following statement:

> "In a previous case, brought by a stranger to the present proceeding, it was held that the very bonds here involved were general obligations, and that all the lands within the District were assessable until all the bonds were paid. Petitioners brought this action on said bonds as trustees; and one of the **cestuis** was an intervener in the previous case. Is it **res judicata** against the District that the bonds are general obligations?"

There is absolutely nothing in the record to justify this statement. No prior judgment of any character was ~~even~~ either pleaded or proved, or even referred to. It is impossible to understand upon what theory the suggestion is made or the question raised in the Petition for Certiorari. At any rate, the question finds no basis whatever in the record. The effect of a prior judgment is defined by the Montana statute as follows:

> "10558. **Effect of a judgment or final order upon rights in various cases.** The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:
>
> "1. In case of a judgment or order against a speci-

fic thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person."

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title, and in the same capacity, provided they have notice, actual or constructive of the pendency of the action or proceeding." R. C. M. 1935.

From a cursory reading of the statute, it appears that prior judgment is conclusive in the following cases only: (1) "when it is between the same parties, or their successors in interest, by title subsequent to the commencement of the action," and (2) when the question being litigated in the subsequent case is being "litigated for the same thing under the same title and in the same capacity," and (3) the judgment is conclusive then only "in respect to the matter directly adjudged" in the former action. Unless the pleading and proof show that all of these conditions exist, a plea of **res judicata** cannot be sustained. In the absence of any pleading or proof, as is the case here, (1) as to the former action; (2) the capacities in which the parties were litigating; (3) the issues involved in the case and the manner in which they were raised, and (4) the matters directly adjudged, neither this court nor the lower

court can even give consideration to the question of **res judicata.**

But in truth and in fact the case of Drake v. Schoregge reported in 85 Mont. 94, did not in any manner, or at all, involve the question of law which is involved in this case. That action was brought by the land owner, Drake, to restrain the County Treasurer from enforcing against his land the collection of a tax levied by the irrigation district. The ground upon which the action was based was the fact that a survey of the land and the proposed ditches to be constructed, showed that the lands owned by the plaintiff, Drake, in that case were not susceptible of irrigation. On that basis and on that basis alone, Drake sought to have the County Treasurer enjoined from collecting the tax. A general demurrer was filed to the complaint and sustained by the trial court. On appeal the Supreme Court held that the demurrer was properly sustained. No other question was involved.

So far as a right to injunction was concerned, it was wholly immaterial whether or not the bonds issued by the irrigation district created "a general indebtedness against the district" as had previously been held in Cosman vs. Chesnut Valley Irrigation District, 74 Mont. 111, or were not "an obligation of the district at all," as was subsequently held in State ex rel Malott v. Board of County Commissioners of Cascade County, 89 Mont. 37 at 94-95. That question was not in any manner involved. Neither the irrigation district nor the bondholders had been made parties to

the action as it was originally filed. They became parties only by intervention. When they became parties by intervention they were not adverse to each other and the nature of the obligation created by the issuance of the irrigation district bonds was not in any manner raised or decided, except to the extent as to whether or not the land of the plaintiff Drake, which was eventually found to be non-irrigable, was subject to the district assessment made in 1926.

It is true that the Justice of the Supreme Court writing the opinion in the case, referred to the previous decision in Cosman v. Chesnut Valley Irrigation District, 74 Mont. 111, and as part of his discussion of the question involved in Drake vs. Schoregge reiterated the view expressed in that case to the effect that "bonds issued create a general indebtedness against the district in the sense that all lands therein are taxable for the payment thereof, with interest, until the entire indebtedness is fully paid." 85 Mont. 104. But that question was not before the Court; it had no bearing upon the question that was actually before the Court and the mere mention of the matter decided in a former opinion was not in any sense an adjudication of a question which was not in issue between the parties to that suit, and which in fact have no bearing whatever upon the sole question involved in that case which was, whether lands eventually found non-irrigable were subject to the assessment made by the district in 1926. The validity of that assessment is not involved in this case in any manner.

The authorities cited on page 22 of Petitioners' brief do not support the view that it is unnecessary to **PROVE** the prior adjudication. Even if, in certain cases it is unnecessary to **PLEAD** the prior adjudication, it is still necessary to prove it. There is no authority to the contrary. In this case there was neither pleading nor PROOF of prior adjudication.

VI.

The alleged "plan" does not change the nature of the District's obligation as created by the original issue of the bonds.

In the Sixth paragraph of "Questions Presented" by the Petition for Certiorari, the Petitioners say:

> "Where, following a Supreme Court decision of the State holding the very bonds here involved to be general obligations, the appellee enters into a new written contract to pay the amount in full with interest and to levy taxes therefor, and there is no Montana decision holding such a contract void, does such a new promise sustain the judgment of the district court?"

The obviously correct answer to this question is the answer given by the decision of the Circuit Court of Appeals in this case.

> 'Appellees' final contention is that, if the bonds here involved were not general obligations of the district when issued, they became such by reason of an agreement which the district's officers made and executed in the name of the district on May 1, 1930. The con-

tention is rejected (1) because this action was not based on that agreement and (2) because that agreement, if and in so far as it purported to make the bonds general obligations of the district, was unauthorized and void. Laws of Montana, 1909, chapter 146, p. 38."

The section of the statute referred to by the Circuit Court of Appeals contains the following provision:

> "The Board of Commissioners or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, except as provided in this act."
>
> Section 7208 Revised Codes of Montana, 1921 and Section 7208 Revised Codes of Montana, 1935.

But even aside from the provisions of the statute above quoted, it is clear that if the bonds of the district are not "an obligation of the district at all" as held in State ex rel Malott v. Board of County Commissioners of Cascade County, 89 Mont. 37 at 94-95, and the district was without authority to pyramid assessments on the land owner who paid his pro rata share of the cost to cover the delinquency of land owners who did not pay as held in Rosebud Land & Improvement Co. v. Carterville Irrigation Co., 102 Mont. 465, then neither the district nor its commissioners could change the nature of the obligation created by the bonds, nor vest themselves with authority to levy against the land within the district assessments forbidden by law, by the mere device of entering into the alleged "Plan" referred to in the Petition for Certiorari. To hold otherwise would be to hold that public officers, whose authority is limited

by law, can increase their authority and broaden their powers by the mere device of entering into a contract to do so.

Furthermore, Respondent respectfully submits that the so-called plan (R. 65 to 73) was a mere device to defer the payment of the bonds. There is nothing in the plan to indicate any intention on the part of the district commissioners to change the liability of the district, or to undertake to make levies not authorized by law. On the contrary, the agreement specifically provides:

> "Sec. 2. The district agrees that it will comply with all of the provisions of the laws of the State of Montana relative to the levy and collection of such taxes." (R. 67).

One of the provisions of law which the Irrigation District thus agreed to comply with, was that assessments against the land within the district could not be pyramided upon the land which paid its pro rata share of the cost of the improvement to cover the delinquencies of the land which did not pay its assessments. Furthermore, the alleged "plan" was not pleaded in the District Court as the basis of recovery (R. 2 to 19), it is not referred to in the District Court's decision (R. 92 & 93) nor in the District Court's findings of fact and conclusions of law (R. 94 to 102) nor in the judgment of the District Court (R. 103-106).

CONCLUSION

Respondent respectfully submits that the Petition for Certiorari herein does not present a proper case for the issuance of the Writ of Certiorari under Rule 38 - 5 (b) of the rules of this Court. The decision of the Circuit Court of Appeals is in harmony with the applicable local decisions of the Supreme Court of Montana; and the only Federal question indicated has heretofore been decided in Erie Railroad v. Tompkins, supr, and the numerous cases following it, holding that the decisions of the Supreme Court of the State are controlling and conclusive upon all questions of local law, except in those cases controlled by the Federal constitution or acts of Congress.

Substantially the same questions involved in this case have heretofore been presented in Petitions for Certiorari filed in this court during the current term:

No. 287-8. Keefe v. Bloomfield Village Drainage District. A petition for Writ of Certiorari to review the decision of the Circuit Court of Appeals of the Sixth Circuit, reported in 119 Fed. (2) 157.

No. 504. Getz et al v. Town of Belleair. A Petition for Writ of Certiorari to review a decision of the Circuit Court of Appeals of the Fifth Circuit, reported in 120 Fed. (2) 494.

In each of the above cases the Writ of Certiorari was prayed for upon the ground that the latest decisions of the Supreme Court of the State overruled earlier decisions and thereby impaired the rights of bondholders, and that

the Circuit Court of Appeals had followed the latest decisions of the State Court.

In each of these cases the Writ of Certiorari was denied by this court during the current term.

> Getz v. Town of Belleair, 62 S. Ct. 125; Keefe v. Bloomfield Village Drainage District, 62, S. Ct. 95, 133, 910, 911.

Respondent respectfully submits that the application for Writ of Certiorari in this case should also be denied.

Respectfully submitted,

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